FILE COPY

IN THE

Supreme Court of the United States

Supreme Court, U. S.
FILED
MAR 13 1973
MICHAEL RODAK, JR., CLERK

October Term, 1972
No. 72-826

IGNATIUS J. BROUSSARD, JR.,

Petitioner,

vs.

RODERICK R. PATTON, CO., UNITED STATES AIR FORCE, BASE COMM., MAFB, JACK J. CATTON, LT. GEN., UNITED STATES AIR FORCE, COMM. 15TH AF, MAFB, ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

GEORGE T. ALTMAN,
424 South Beverly Drive,
Beverly Hills, Calif. 90212,
Attorney for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Grounds for Rehearing	1
Conclusion	3

TABLE OF AUTHORITIES CITED

Cases

Robb v. United States (Ct. Cl., 1972) 456 F. 2d 768	1, 2, 3
United States v. Anderson, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968)	2
United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970)	2

Statutes

Uniform Code of Military Justice, Art. 2(10)	2
United States Constitution, Art. I, Sec. 8, Cl. 11	2

IN THE

Supreme Court of the United States

October Term, 1972
No. 72-826

IGNATIUS J. BROUSSARD, JR.,

Petitioner,

vs.

RODERICK R. PATTON, CO., UNITED STATES AIR FORCE, BASE COMM., MAFB, JACK J. CATTON, LT. GEN., UNITED STATES AIR FORCE, COMM. 15TH AF, MAFB, ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

We now petition the Court for rehearing of our petition for a writ of certiorari.

Grounds for Rehearing.

Our principal ground is to bring to the Court's attention a conflict of the decision below with *Robb v. United States* (Ct. Cl., 1972) 456 F. 2d 768, which did not come to our attention until after we had filed reply to the brief in opposition.

That case involved a civilian employee of the Navy on duty in Vietnam during 1967 and 1968. He was

court-martialed under Article 2(10) of the U.C.M.J., which authorized court-martial in "time of war" of "persons serving with or accompanying an armed force in the field." He was convicted. A fine was imposed upon him and suit was filed for its refund contending that "time of war" in the case of a civilian could only mean a war declared by Congress, citing *United States v. Averette*, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970), referred to in our reply brief.

The Court of Claims, conceding that, the parties not being the same, it was not "bound" by *Averette* (p. 772), decided nevertheless to "adopt" *Averette* (p. 771), without defending it, indeed, even admitting, through the voice of a concurring member of the Court, that it could not find "a basis in reason" for *Averette* (p. 772).

If *Averette*, however, was right, was *Anderson* (*United States v. Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968)) still right? In other words, if Vietnam was not a "time of war" for a civilian serving with an armed force in the field, was it nevertheless a "time of war" for the very armed force with which he was serving? And why would this difference be erased by a declaration of war? In substance, is there anything in Article I, Section 8, Clause 11 of the Constitution to say that it applies only to civilians, that the Constitution, or the power of Congress under it, has no application to a member of the armed forces?

No wonder the Court of Claims in *Robb* "adopted" *Averette* without attempting to find "a basis in reason" for it. It even went so far as to say that a recognition of the actual war character of the Vietnamese armed conflict "should not serve as a shortcut for a

formal declaration of war", that is, "at least" not as far as civilians are concerned (p. 771). But, under the decision herein below, as far as members of the armed forces are concerned, there is no such recognition of the power of Congress under the Constitution.

We submit that the decision herein below cannot, on a basis of reason and substance, be reconciled with *Robb*. Consistently with reason and substance, the conflict between them cannot be erased or avoided.

Conclusion.

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Dated: March 13, 1973.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioner.

Certificate of Counsel.

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

GEORGE T. ALTMAN,
Counsel for Petitioner.